

THE PEOPLE OF THE PHILIPPINES, PLAINTIFF AND APPELLEE, VS. TORIBIO C. TABANAO, DEFENDANT AND APPELLANT.

G.R. No. L-17233. September 29, 1962

Ponente: LABRADOR, J.

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LABRADOR, J.:

Appeal from the decision of the Court of First Instance of Cebu, the Hon. Modesto R. Ramolete, presiding, sentencing the accused-appellant to an indeterminate penalty of 3 years of prision correccional as minimum, to 7 years of prision mayor as maximum and to pay the costs.

Appellant Toribio C. Tabanao was charged with malversation of public funds in Criminal Case No. V-5773 of the Court of First Instance of Cebu. The information alleges:

"That on or about the 23rd day of August, 1956 and for sometime prior thereto, in the municipality of Moalboal, province of Cebu, Philippines, and within the jurisdiction of this Court, the above-named accused, then employed as Clerk-Bookkeeper of the Office of Municipal Treasurer of said municipality, and as such had among his official duties the collection of taxes and other public properties and issuing official receipt for said collection and hence accountable for public funds in his possession, with deliberate intent of gain and taking advantage of his position, did then and there wilfully, unlawfully and feloniously misappropriate for his own use and benefit the amount of Two Thousand Three Hundred Seventy-Six Pesos and forty three centavos (P2,376.43), which was then in his possession, to the damage and prejudice of the government of the amount aforesated."

Arraigned on March 3, 1960, the defendant-appellant, assisted by his counsel, pleaded guilty to the charge. Upon the basis of his plea, the trial court found him guilty beyond reasonable doubt as charged and appreciating his plea of guilty as a mitigating circumstance, without any aggravating circumstance to offset it, forthwith sentenced him to suffer the penalty above stated. No indemnity was decreed because the defendant had previously fully reimbursed the amount misappropriated, (pp. 2-3 t.s.n.)

In his brief, appellant claims that after the liberation, his son developed an illness due to the war; that it was extreme necessity due to the illness of his son that drove him to commit the offense charged; that the amount was taken on several occasions to finance the lingering illness of his son; that the assistant provincial fiscal had recommended to the trial judge that in addition to the plea of guilty, his poverty be considered also as another mitigating circumstance. These statements were objected to by the Solicitor General on the ground that they are not supported by the record.

Appellant argues that under par. 2 of Art. 217 of the Revised Penal Code, as amended by Republic Act No. 1060, the penalty for malversation of an amount of more than P200 but not more than P6,000 is prision correccional in its maximum period to prision mayor in its medium period, or from 4 years, 2 months, and 1 day to 10 years; that the fiscal having recommended to the trial judge that appellant's extreme poverty be considered as another mitigating circumstance, appellant should be credited with two (2) mitigating circumstances and consequently, the penalty imposable upon him should be prision correccional in its minimum, which is from 6 months and 1 day to

2 years and 2 months, and that applying the Indeterminate Sentence Law, the sentence would only be for an indeterminate penalty ranging from the maximum of arresto mayor to the minimum of prision correccional, or 4 months and 1 day to 2 years and 4 months.

The penalty for the offense charged in this case is not prision correccional in its maximum period to prision mayor in its medium period, as the appellant argues; but prision mayor in its minimum and medium periods, as provided for in Rep. Act 1060, amending Art. 217 of the Revised Penal Code. The penalty lower by one degree of this penalty is prision correccional in its medium and maximum periods. Applying the Indeterminate Sentence Law and taking into consideration the mitigating circumstance of plea of guilty, the minimum of the penalty is from 2 years, 4 months and 1 day to 6 years of prision correccional while the maximum is from 6 years and 1 day to 7 years and 4 months of prision mayor.

The Indeterminate Sentence Law provides:

"SEC. 1.—Hereafter, in imposing a prison sentence for an offense punished by the Revised Penal Code, or its amendments, the court shall sentence the accused to an indeterminate sentence the maximum term of which shall be that which, in view of the attending circumstances, could be properly imposed under the rules of the said Code, and to a minimum which shall be within the range of the penalty next lower to that prescribed by the Code for the offense; * * *"

The penalty prescribed for the offense charged in the case at bar is prision mayor in its minimum and medium periods, or from 6 years, 1 day to 10 years. In view of the presence of one mitigating circumstance and no aggravating, the proper penalty imposable is the minimum of the penalty prescribed, which is from 6 years, 1 day to 7 years, and 4 months of prision mayor. One degree lower to that penalty prescribed by the Code is prision correccional in its medium and maximum periods, or 2 years, 4 months, 1 day to 6 years. The penalty imposed by the trial court as minimum is 3 years. This is within the range of the penalty next lower in degree to that prescribed by the Code; the 7 years maximum is also within the range of the penalty properly imposable under the circumstances.

It is also argued that extreme poverty should be considered as an additional mitigating circumstance, for which reason the penalty could be lowered by two degrees because of two mitigating circumstances, namely plea of guilty and poverty. The mitigating circumstance of poverty was neither admitted by the prosecution nor found by the judge. According to the record, of the P2,376.43 misappropriated, only P50.00 was used for the illness of appellant's son. Furthermore, appellant may not claim poverty for he was a clerk receiving a salary. Poverty is a condition worse than that of a poor person. (Webster's International Dictionary) He may have been poor, but with his salary as clerk he certainly was not in a condition of poverty. The claim of an additional mitigating circumstance can not, therefore, be justified.

Finding no error in the sentence imposed, the judgment is hereby affirmed, with costs.

So ordered.

Bengzon, C. J., Padilla, Bautista Angelo, Reyes, J. B. L., Paredes, Dizon, and Makalintal, JJ., concur.

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